

UNITED STATES DEPARTMENT OF AGRICULTURE
OFFICE OF INSPECTOR GENERAL

**STATEMENT FOR THE RECORD
OF THE HONORABLE PHYLLIS K. FONG
INSPECTOR GENERAL**

Before the

COMMITTEE ON HOMELAND SECURITY AND
GOVERNMENT AFFAIRS

U.S. SENATE

To Accompany the Hearing Record
Of Wednesday, July 11, 2007



Thank you, Chairman Lieberman and Ranking Member Collins, for inviting me to submit a statement for the record on several issues of interest pertaining to the independence, accountability, and operations of Federal Offices of Inspectors General (OIG). I would also like to express my thanks to Ranking Member Collins for her introduction of S. 680 in this Congress and to Senator McCaskill for her support of the Inspectors General, as reflected in her recent introduction of S. 1723.

I have served as the Inspector General (IG) for the Department of Agriculture (USDA) since December 2002. Prior to that, I served as the IG at the Small Business Administration from April 1999 until December 2002. My entire career in executive-level positions in the Federal IG community spans 19 years, and I am a career member of the Senior Executive Service (SES).

In addition to my service as USDA's IG, I am currently the Chair of the Legislation Committee for the President's Council on Integrity and Efficiency (PCIE). Created in 1981, the PCIE provides a forum for IGs, the Office of Management and Budget (OMB), and other Federal officials to work together and coordinate professional activities. The Legislation Committee consists of IGs from both segments of the IG community---nine presidentially-appointed (PAS) IGs who are members of the PCIE, and three IGs who were appointed by agency heads in Designated Federal Entities (DFEs), and thus are members of the Executive Council on Integrity and Efficiency (ECIE). The ECIE provides a forum similar to the PCIE for the DFE IGs.

The PCIE Legislation Committee serves as the IG community's primary point of contact and liaison on legislative issues with congressional committees, congressional offices, and the Government Accountability Office (GAO). The Legislation Committee is responsible for providing input to and receiving feedback from Congress on legislation affecting the IG community as a whole. The Committee works toward developing consensus within the entire IG community

regarding major legislation impacting IGs; on some issues, however, there may be a range of perspectives that reflect different IGs' experiences and situations.

My statement today is submitted on behalf of the PCIE Legislation Committee and, when appropriate, based upon my experience as an IG at two Federal agencies. I am not representing the views of or speaking for the Administration in my statement.

Provisions Common to Both S. 680 and S. 1723

First, I will address the provisions of S. 680 and S. 1723 that are common to both bills and of particular interest to the IG community.

Advance Notification to Congress of an IG's Removal

Both S. 680 and S. 1723 provide that Congress should be notified 15 days prior to the removal of a DFE IG. There is no mention made, however, of providing advance notification to Congress in the case of the removal of a PAS IG. We recommend that this section apply to all IGs. Moreover, we believe that 15 days might provide insufficient time for effective review by Congress, and we recommend that the notice period be extended to 30 calendar days prior to the proposed action to remove an IG. This should allow sufficient time for congressional review and any discourse with the President as to the reasons for the removal of an IG.

Qualifications of DFE IGs

Currently, the IG Act provides that PAS IGs must be appointed without regard to political affiliation and solely on the basis of their integrity and "demonstrated ability in accounting, auditing, financial analysis, law, management analysis, public administration, or investigations." Both S. 680 and S. 1723 would amend the IG Act by requiring similar qualifications for DFE IGs. Although we believe that in practice this usually occurs with appointments of DFE IGs, making these qualification

requirements a statutory prerequisite for DFE IGs would ensure that qualified candidates are recruited and would enhance their immediate credibility within their establishment. The PCIE Legislation Committee supports this provision.

Compensation Issues Involving PAS IGs

Department of Interior IG Earl Devaney and Department of Justice IG Glenn Fine testified on July 11, 2007, that a significant issue for the PAS IGs is the pay disparity they encounter. Currently, a number of PAS IGs are ineligible for locality pay and cost-of-living adjustments, are excluded from the benefits of the performance-based pay system Congress established for career senior executives, must forego potential bonuses to preserve OIG independence, and have their salaries capped by statute at Level IV of the Executive Schedule, without the possibility of promotion. At a time when IG responsibilities are steadily increasing and congressional committees, agency heads, and the public look to IGs to ensure integrity in Government operations, virtually all PAS IGs are paid at a level significantly below the average annual compensation of the SES personnel they supervise. This disparity in compensation is a significant concern for current PAS IGs and could have an increasing impact on the Government's ability to retain experienced IGs. Perhaps more important, however, is the impact on the willingness of qualified and talented Federal career executives to serve as PAS IGs.

Both S. 680 and S. 1723 propose to equitably remedy this situation by simply moving PAS IGs from Level IV of the Executive Schedule pay scale to Level III. While this adjustment would not completely address the pay disparity for PAS IGs, it would be a positive step towards recruiting and retaining well-qualified IG candidates.¹

¹ We believe that the issue of DFE IG rank and pay also needs to be addressed. Section 9(b) of S. 1723 would provide that the IG of each DFE "shall, for pay and all other purposes, be classified at a grade, level, or rank designation . . . comparable to those of a majority of the senior staff members of such designated Federal entity (such as, but not limited to, a General Counsel, Deputy Director, or Chief of Staff) that report directly to the head of such designated Federal entity." We understand that the Vice Chair of the ECIE is submitting a statement for the record which will address the position of the DFE IGs regarding pay and bonuses.

Prohibition of Cash Bonuses or Awards

PAS IGs as a matter of long-standing practice do not accept cash bonuses or awards, so as to avoid any potential questions regarding their independence and impartiality. The PCIE Legislation Committee supports this provision with respect to PAS IGs.

PFCRA and Subpoena Authority

Both S. 680 and S. 1723 include provisions that the PCIE Legislation Committee believes would improve the effectiveness of OIG audit and investigative activities. First, the bills would amend the Program Fraud Civil Remedies Act (PFCRA) to allow DFE IGs to utilize the Act's processes to pursue false claims and statements where the loss to the Government is less than \$150,000. Presidentially-appointed IGs already can utilize PFCRA to recover the loss of taxpayer dollars due to fraud, and smaller OIGs should also have the ability to pursue lower-threshold fraud cases. DFE IGs are not currently authorized to utilize PFCRA procedures because those IGs had not been created at the time of PFCRA's enactment.

Secondly, the bills would modernize IG law enforcement capabilities by clarifying that IG subpoena authority extends to electronic information and tangible things. This is an important clarification at a time when ever-increasing amounts of information are stored electronically and technological advances are constantly creating new forms of data, computer equipment, and data transmission devices. Amending the IG Act to include this clarification on electronic information and tangible things ensures that the IGs have access to all relevant physical evidence, no matter its particular form, as we perform our duties and responsibilities.

The Provisions of S. 1723

Next, I will address the provisions of S. 1723 that are not in S. 680 that are of particular interest to the IG community.

Term Appointment and Removal for Cause

Section 2 of S. 1723 would establish a renewable term of office of 7 years for both PCIE and ECIE IGs and would authorize removal of an IG prior to the expiration of the term for certain enumerated causes. The IG Act currently provides no specified term of office for IGs; the only limit on the authority to remove IGs is a requirement that Congress be notified of such removal.

We note that individuals occupying a number of other positions with identical or analogous oversight functions in the executive branch may be removed only for cause. For instance, the IG of the U.S. Postal Service and the Special Counsel may be removed only for cause. In the legislative branch, the Comptroller General of the Government Accountability Office possesses removal for cause protection. We believe that removal for cause criteria would further congressional intent to provide IGs with the independence necessary to carry out our responsibilities and would better insulate IGs from undue influence.²

We also note that there are a number of analogous functions within the executive branch that have fixed terms of office. For example, the Director of the Office of Government Ethics, the Special Counsel, and members of the Federal Labor Relations Authority all have 5-year terms. Merit Systems Protection Board members have 7-year terms. Other officials with similar duties but broader responsibilities, such as the Comptroller General and the Director of the Federal Bureau of Investigation, have terms of 15 years and 10 years, respectively.

² The removal for cause provisions in Section 2 of S. 1723 are very similar to the removal for cause provisions for the Comptroller General of the Government Accountability Office. See 31 U.S.C. § 703(b).

While the PCIE Legislation Committee understands that some may have concerns about the effectiveness of these provisions, we believe that IG independence would be enhanced by their enactment, particularly when coupled with a provision requiring advance notification to Congress prior to removal of an IG. We would welcome the opportunity to work with the Committee to clarify the removal for cause criteria if there is concern as to their meaning and effect.

Establishment of a Council of the Inspectors General on Integrity and Efficiency

Section 4 of S. 1723 would create a unified IG Council to enhance coordination and communication among OIGs and better serve the executive branch and the Congress. A unified council would promote the independence and unique responsibilities of IGs by creating a forum for more sustained and organized IG initiatives on a Government-wide basis. Just as individual IGs have dual responsibilities to both the executive and legislative branches, so too would a statutory unified council. For example, the Deputy Director for Management of OMB would serve as the council's executive chair and the council would also be responsive and report to Congress, as appropriate. The bill would also establish a necessary funding mechanism for the council's institutional activities, such as publishing an annual progress report; providing essential training programs for OIG audit, investigative, inspection, and management personnel; and providing sessions to orient newly-appointed IGs as well as to keep experienced IGs abreast of current issues.³ The PCIE Legislation Committee supports statutorily establishing a single IG Council for all executive branch IGs.

We do, however, suggest that the Committee consider requiring the annual progress report called for in proposed subsection 11(b)(3)(B)(viii) be issued jointly to the

³ With regard to funding the Inspectors General Council's activities, this could be handled through annually appropriated funds or through alternative means. For instance, the Chief Financial Officers Council receives some or all of its funding from rebates on Federal charge cards and other contracts pursuant to Section 629 of Pub. L. 107-67.

President and the Congress. This change would then comport with and mirror the dual reporting requirements that individual IGs have to the head of their agency and to Congress.

In the area of accountability, the unified IG Council provision would permanently establish an Integrity Committee (IC) to handle allegations of wrongdoing on the part of an IG or certain OIG staff. The IC is a response to the question of "*Who is watching the watchdogs?*" The functions of the current IC are set forth in Executive Order 12993. The bill includes several provisions to maintain quality and integrity in IC operations, including a requirement to adhere to the most current Quality Standards for Investigations issued by the IG Council or the PCIE/ECIE and requirements to ensure fairness and consistency in the operations of the committee. The bill would provide, for example, that the subject of an investigation have the opportunity to respond to any IC report.

We have the following suggestions for the Committee's consideration regarding the IC provisions.

1. The bill (proposed subsections 11(d)(4)(A)(i) and (ii) of the IG Act) requires an IG to refer to the IC any allegation against a "staff member" if the allegation cannot be assigned to an executive branch agency and an objective internal investigation is not feasible or an internal investigation may appear not to be objective. The bill would require each IG annually to submit a designation of positions considered "staff members" for the purpose of that section. This seems to be an unnecessary burden that is not currently contained in E.O. 12993. Rather than an annual designation, we would suggest "staff member" be defined as follows in the proposed subsection 11(d)(4):

(B) STAFF MEMBER DEFINED---In this subsection the term "staff member" means--

(i) any employee of an Office of Inspector General who reports directly to an Inspector General; or

(ii) any other senior official of an Office of Inspector General when the Inspector General determines the conditions of subsections (4)(A)(i) and (ii) are met.

This definition would afford IGs the opportunity to address situations where the IG does not designate a position, but later determines an allegation against the holder of that position should be referred to the IC.

2. The proposed subsection 11(d)(5)(B) of the IG Act provides for IC review and referral for investigation allegations of “wrongdoing” that are made against IGs, direct reports to IGs, and other designated staff. The bill does not, however, define “wrongdoing.” We note that this is a significant departure from the language in E.O. 12993, which currently authorizes the IC to investigate an allegation only if there is a substantial likelihood that the allegation discloses a violation of law, rule or regulation, gross mismanagement, gross waste of funds, or an abuse of authority. The use of the word “wrongdoing” may allow for a broader exercise of the IC’s authority than is currently authorized. In addition, it is not clear whether the removal for cause criteria would constitute the universe of “wrongdoing” that the IC would be authorized to investigate.

3. Proposed subsection 11(d)(5)(B) of the IG Act also states the IC shall “refer to the Chairperson of the Integrity Committee any allegation of wrongdoing determined by the Integrity Committee to be meritorious that cannot be referred to an agency of the executive branch with appropriate jurisdiction over the matter.” We would suggest some form of modifier be added to the standard of “meritorious,” such as “potentially” to mirror the language in E.O. 12993 and to avoid any perception of prejudgment of an allegation.

4. Proposed subsection 11(d)(7)(C) of the IG Act states “The Chairperson of the Integrity Committee shall report to the Executive Chairperson of the Council the results of any investigation that substantiates any allegation certified under paragraph (5)(B).” We believe the word “certified” was taken from E.O. 12993. However, the bill uses the word “refer” rather than “certify” in proposed subsection 11(d)(5)(B).

Accordingly, the word "certified" in proposed subsection 11(d)(7)(C) should be changed to "referred."

Our last comment concerning the creation of a unified IG Council pertains to the treatment of legislative branch IGs. Although not specifically named as members of the ECIE by executive order, we understand that the IGs at the Government Printing Office, the Capitol Police, and the Library of Congress in practice are members of the ECIE. Pending legislation would also create an IG at the Architect of the Capital. Consideration needs to be given to the treatment of these legislative branch IGs: whether to include them within the unified IG Council and whether to extend to them the same statutory independence and operational authorities as are being considered for PAS and DFE IGs.

Separate Legal Counsel for IGs.

Section 2(c) of S. 1723 would require that all IGs appoint a legal counsel that reports directly to the IG. We support the concept of separate legal counsel reporting directly to the IG, believing that this is as critical to an OIG's independence as having independent auditors and investigators. However, there are some DFE OIGs that have only a few employees. Consequently, some of the smaller OIGs could find this provision difficult to implement without additional resources, particularly since there is no requirement that this position constitute an additional position within an OIG. We believe that careful thought needs to be given as to how this provision would be implemented.

Direct Submission of Budget Requests to Congress and Personnel Authorities.

The PCIE Legislation Committee supports Section 3 of S. 1723, which authorizes IGs to submit their annual budget requests directly to OMB and to Congress. Although many IGs receive support from their agency heads in their appropriation requests, this provision would further enhance IG independence, particularly where

an IG and an agency head disagree on the appropriate level of resources for the OIG. This provision should, however, be discretionary with IGs as not all Federal agencies and establishments participate in the annual budget and appropriation process.

Section 9(a) of S. 1723 would provide IGs with certain personnel authority with respect to early out/buyouts, waivers of mandatory separation for law enforcement officers, and OIG SES personnel.⁴ While we fully support these provisions, we recommend that Sections 8344 and 8468 of Title 5, U.S. Code also be added to this grant of authority. These provisions deal with reemploying annuitants. At present, an IG cannot go directly to the Office of Personnel Management (OPM) to seek a waiver to reemploy an annuitant. An IG must go through his or her agency and obtain the approval of the agency head. Just like the other proposed provisions that give the IG authority to go directly to OPM for SES allocations and buyout authority, it would be useful and efficient if the IGs were authorized to seek waiver authority directly from OPM. For example, in the context of Hurricane Katrina and the additional oversight responsibilities of the Department of Homeland Security (DHS) OIG, it needed to draw upon the expertise of its retired annuitants (e.g., retired auditors and investigators). The process of getting these people back on board to help in this emergency was slowed down by having to work through DHS rather than being able to go directly to OPM for waivers.

Law Enforcement Authority for DFE IGs

Section 9(d) of S. 1723 would authorize DFE IGs to apply for full law enforcement authority rather than having to apply for such authority on a case-by-case basis. Presidentially-appointed IGs obtained this authority pursuant to the Homeland Security Act of 2002, which allows them to make arrests, execute search warrants, and carry firearms. This authority has been used effectively by PAS IGs. The bill would make it available to those DFE IGs who seek such authority, once approved by the Department of Justice. Of course, those DFE IGs would have to satisfy the

⁴ 5 U.S.C. §§ 8335(b), 8336, 8414, and 8425(b).

same requirements and adhere to the same standards regarding law enforcement authorities as the PAS IGs must. We support this provision.

Recommendations on Filling IG Vacancies

The proposed subsection 4(c)(1)(F) of the IG Act contained in Section 4 of S. 1723 would require the unified IG Council to submit recommendations of three individuals for appointment consideration for any IG vacancy. In general, we would support a consultative role for the IGs or the proposed IG Council in filling IG vacancies. It is our understanding that in the past, IGs were consulted from time to time by OMB as to possible candidates for IG vacancies. While we would be willing to serve as one resource for identifying possible IG candidates, it would not be appropriate for us to be the only source of candidates or for the council to be perceived as interfering with or duplicating the extensive background investigation process already in place for PAS appointees.

Information on Web Sites of Offices of Inspectors General

In general, we support enhancements to agency web sites to make links to IG offices more visible. We also support posting many OIG products on the IG web sites. In our view, it is very important for IGs to provide transparency on how Government operates. We believe that the majority of the IGs are currently posting audit and inspection reports on their agency web sites. Accordingly, we have several suggestions and comments concerning Section 12 of S. 1723.

1. The bill should clarify that it is referring to OIG audit and inspection or evaluation reports, not reports of investigations. Traditionally, most reports of investigation are not publicly released because they can discuss law enforcement techniques, prejudice related criminal, civil, or administrative proceedings, or result in unwarranted invasion of privacy or damage to reputation.

Even in the case of reports such as audits or inspections, care must be taken that sensitive information that could jeopardize Government operations is not inappropriately released, such as critical IT processes or operations or confidential business or financial information submitted by outside parties or entities. If such confidential information is not able to be protected, it could jeopardize the Government's ability to collect necessary and relevant information in the future. We therefore recommend that this provision in the bill cross-reference the Freedom of Information Act (FOIA) to make clear that OIGs do not need to post information that is not subject to disclosure under FOIA. We suggest adding the following clause at the beginning of subsection 12(c)(1)(B): "Consistent with such disclosure as is required under 5 U.S.C. § 552a,"

2. We are concerned with the requirement in subsection 12(c)(1)(A) that addresses the posting of OIG reports. We believe the 1-day posting requirement may not be realistic, since many OIGs rely on their agencies to post material on agency web sites. We recommend, instead, that the subsection be reworded to require IGs to post audit, inspection, evaluation, or semiannual reports "as soon as is practicable" after their issuance.

3. The proposed subsection 12(c)(1)(B)(iii)(I) requires that IG web sites be in a format "that is searchable, sortable, and downloadable." We have some concern with the requirement that IG web sites or agency web sites have "sortable" capabilities. We do not believe that many OIG or agency web sites have sorting capabilities. This might require significant and costly IT upgrades before implementation is possible, and we recommend that this be explored before becoming statutorily mandated. If such capabilities are cost prohibitive, then we recommend that the word "sortable" be deleted from the subsection.

4. Subsection 12(c)(2) of S. 1723 would require each OIG to offer to the public a service on its web site so that individuals would "automatically receive information (including subsequent reports or audits) relating to any posted report or audit (or

portion of that report or audit).” We believe this would be extremely and unnecessarily burdensome. OIGs have limited staff and resources, and it would be costly and resource intensive to establish and maintain such a database and notification system. We recommend that this provision be deleted. On balance, we think it would be less burdensome for interested individuals to check on web sites from time to time to see if there is a report of interest than to require IGs to maintain such a system.

5. Subsection 12(c)(3)(B) of S. 1723 requires that IGs take such actions as are necessary to ensure the anonymity of any individual making a report of fraud, waste, and abuse through an OIG's website. This requirement does not recognize that there will be instances when the disclosure of such individual's identity is necessary for legitimate law enforcement or remedial purposes. We are concerned, additionally, that it may not be technologically possible to assure anonymity of an individual, given the placement of internet servers in various agencies and the technical capabilities associated with their operations and maintenance. It would be more feasible—and consistent with current IG Act requirements regarding employee complainants—to require an IG to protect the identity of an individual making a report on the web site. We therefore recommend that this language be modified to more closely track the assurances of confidentiality set forth in Section 7(b) of the IG Act --- that the IG of each agency "shall not disclose the identity of any individual making a report under this paragraph without that individual's consent unless the Inspector General determines that such a disclosure is unavoidable during the course of the investigation."

Alternatively, the bill could be reworded as follows:

“(B) PROTECTION OF IDENTITIES.—The Inspector General of each agency shall take such actions as are practicable to protect the identity of any individual making a report under this paragraph.”

This concludes my statement. Thank you for the opportunity to provide the Committee with our views on this important legislation. I look forward to working with the Members of the Committee and your staff to improve the effectiveness of our offices and the departments and agencies we serve.